

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

April 19, 2011

The Rhode Island Ethics Commission held its 6th meeting of 2011 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, April 19, 2011, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Ross Cheit, Vice Chair Edward A. Magro

J. William W. Harsch, Secretary Mark B. Heffner

James V. Murray John D. Lynch, Jr.

Deborah M. Cerullo SSND John M. LaCross

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt and Amy C. Stewart; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m. the Vice Chair opened the meeting. The first order of

business was the introduction of and administration of the oath of office to new Commissioner John M. LaCross. Vice Chair Cheit administered the oath of office to Commissioner LaCross.

The next order of business was a motion to approve the minutes of the Open Session held on March 22, 2011. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve minutes of the Open Session held on March 22, 2011.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Michael Fine, M.D., the Medical Director of the Rhode Island Department of Corrections. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Michael Fine, M.D., the Medical Director of the Rhode Island Department of Corrections.

The next advisory opinion was that of Alice C. Brady, a member of the North Providence Town Council. Commissioner Murray disclosed that he represented the Petitioner approximately three years ago, but the matter has concluded and there is no existing relationship. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner LaCross, the Petitioner stated her understanding that the Council would review and discuss each line item in the budget, with the exception of the School Department, prior to voting on the whole budget. In response to Vice Chair Cheit, the Petitioner informed that her understanding is that the Council could potentially engage in discussion of and vote on each item.

In response to Vice Chair Cheit, Staff Attorney Gramitt advised that the nepotism regulation's class exception is not self-executing with respect to budget matters. In response to Vice Chair Cheit, the Petitioner stated that she had not discussed the issue with the Solicitor. Commissioner Heffner expressed concern that the Petitioner would not have the budget far enough in advance to be able to determine what she can and cannot participate in. The Petitioner stated that the Council does receive the budget in advance, with a first consideration of it scheduled for late May and the final vote in June. Commissioner Heffner suggested that the Petitioner might want to get advice on the issues of individual line items that will be considered so that she does not have to return to the Commission each time. The Petitioner informed that the Council has

its own attorney who is not the Solicitor. Vice Chair Cheit stated that she may wish to consult with the attorney. Commissioner Heffner agreed. Commissioner Harsch complimented the Petitioner on taking care to address these issues. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Alice C. Brady, a member of the North Providence Town Council.

The next advisory opinion was that of Jared R. Nunes, a member of the Rhode Island House of Representatives. Staff Attorney Stewart advised that this matter was continued from the last meeting to allow the Petitioner to present additional information, which was utilized to refine the draft analysis. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. The Petitioner stated that, although it is true that he only worked as a general contractor on one project in the last ten years, his company has been consistently bidding, albeit unsuccessfully, on state contracts during that time period. In response to Vice Chair Cheit, Staff Attorney Stewart advised that the company's consistent bidding history does not place it in contractual privity with the state, noting that one is only an independent contractor during the duration of the contract. Vice Chair Cheit inquired if the Petitioner is satisfied with the opinion, which does allow him to work as a subcontractor. The Petitioner replied that he is satisfied; however, he would like to be

able to pursue other state contracts.

In response to Commissioner Harsch, the Petitioner represented that the company is owned by his father, brother and himself. He stated his belief that his father owns 80% and he and his brother each own 10%. In further response to Commissioner Harsch, he indicated that, although they each have multiple tasks, he and his brother generally are in the field performing work and his father handles more office work. The Petitioner informed that they have about ten employees now, down from as many as thirty at one time. He represented that neither his brother nor his father are state office holders or employees. In response to Commissioner Harsch, Staff Attorney Stewart distinguished the Petitioner's situation, involving a private company, from a prior opinion issued to Dr. Gifford which involved state action to renew licenses. Commissioner Harsch inquired if the Petitioner could simply opt out of the bidding process, with the recusal going up the chain of command to his family member. The Petitioner informed that he does not formulate the bids.

In response to Commissioner Heffner, the Petitioner stated that his interaction with the customer usually begins when he moves a machine to the site to start a job. He explained that the only jobs he has ever bid on himself involved his friends. He advised that the company's general manager, Kevin McGee, provides the estimates and handles the billings. In response to Commissioner Harsch, the Petitioner informed that there is a DOT field inspector on all state jobs

to which he would be accountable, whether as a general contractor or subcontractor. Commissioner Harsch inquired if the Petitioner would be in a position to have contact with the state employee evaluating the bid or awarding the contract. The Petitioner replied that he could not foresee that situation occurring.

In response to Vice Chair Cheit, the Petitioner stated that he was not aware that he would have to recuse from bidding on state work when ran for office. Commissioner Harsch commented that the Petitioner is not the company, he is a minority shareholder. Staff Attorney Stewart informed that Regulation 5007 states that employment shall also include service as an independent contractor or consultant to the state or any state agency, whether as an individual or a principal of an entity performing such service. Vice Chair Cheit expressed that the prohibition is not a personal statement regarding your intent or integrity, but the Code does restrict the conduct of elected officials. Commissioner Harsch stated that he understands the position of the Vice Chair and the Staff but that he would not vote to approve the draft because of the points he had raised. He suggested that the Petitioner consult with an attorney to discuss the issue.

In response to Commissioner Heffner, the Petitioner informed that he serves on the Corporations Committee, but not in a leadership position. In response to Commissioner Heffner, Staff Attorney Stewart stated that had the Petitioner's company been the successful bidder on a 2010 DOT contract the analysis could have changed. She

informed that it would be allowed to finish the work on that contract. She stated after researching statutes and case law regarding what constitutes an independent contractor she concluded that once the specific work or assignment has been completed, there is no further contractual relationship. In further response to Commissioner Heffner, she distinguished the company's history of seeking contracts with the state from actually being contractually bound by contracts with the state.

In response to Commissioner Heffner, the Petitioner represented that the bidding process involves the submission of a sealed bid, which is opened publicly. Commissioner Heffner inquired if there should be an exception for contracts awarded pursuant to sealed bids. He suggested that there be a further carving out on this issue so as not to deter people who serve in public office from working in the private sector in this economy. Staff Attorney Stewart stated that the draft opinion is based on the current status of the Code, which provides no such exception. Commissioner Harsch inquired if the analysis would change if the Petitioner represented that he would wall himself off from the bidding process and delegate it up the chain of command to the 80% owner. Staff Attorney Stewart indicated that it would be difficult to do so with a small family business.

Commissioner LaCross commented that section 5(n)(1) spells out that as an elected official the Petitioner cannot seek such state employment, regardless of whether the bids are sealed or not. Vice

Chair Cheit noted that the concerns raised by Commissioners Heffner and Harsch are policy questions and, although perhaps there should be a sealed bid exception, the opinion is based on the current status of the Code. In response to Commissioner Heffner, Legal Counsel Alves advised that the sealed bid aspect is not included in the statute and would require an amendment to the regulation. He stated that the language of 5(n)(1) is very clear and the fact that the Petitioner's company has been consistently bidding on such contracts is irrelevant. Legal Counsel Alves also informed that the Petitioner has represented that he is a principal of the company. Upon motion made by Commissioner Lynch and duly seconded by Commissioner Cerullo, it was

VOTED: To issue an advisory opinion, attached hereto, to Jared R. Nunes, a member of the Rhode Island House of Representatives.

AYES: Deborah M. Cerullo SSND, Mark B. Heffner, Edward A. Magro, John D. Lynch, Jr., John M. LaCross and Ross Cheit.

NOES: J. William W. Harsch and James V. Murray.

Vice Chair Cheit requested that this issue be placed on the Commission's list of issues for further consideration.

The next advisory opinion was that of Christopher Wilkens, a member of the Narragansett Town Council. Staff Attorney Stewart presented

the Commission Staff recommendation. The Petitioner was present. In response to Vice Chair Cheit, the Petitioner stated his desire to subdivide #55, sell the building and have a lot on which to build his own residence. Vice Chair Cheit noted that the hardship exception has a lot of factors, but here the Petitioner bought the property prior to being elected and intends to use it as his primary residence. Upon motion made by Commissioner Lynch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Christopher Wilkens, a member of the Narragansett Town Council.

At 10:00 a.m. upon motion made by Commissioner Harsch and duly seconded, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.)Motion to approve minutes of Executive Session held on March 22, 2011.

b.)Motion to return to Open Session.

The Commission returned to Open Session at 10:05 a.m. Vice Chair Cheit reported that the Commission unanimously to approve the minutes of the Executive Session held on March 22, 2011.

The next order of business was Election of Officers. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To elect Ross Cheit as Chairperson.

ABSTENTION: Ross Cheit.

Commissioner Murray made a motion to elect John D. Lynch, Jr. as Vice Chairperson, which was duly seconded by Chair Cheit. Commissioner Magro made a motion to elect Deborah M. Cerullo SSND as Vice Chairperson, which was duly seconded by Commissioner Harsch. On the motions, it was

VOTED: To elect Deborah M. Cerullo SSND as Vice Chairperson.

AYES: J. William W. Harsch, Mark B. Heffner, Edward A. Magro and John D. Lynch, Jr.

VOTED: To elect John D. Lynch, Jr. as Vice Chairperson

AYES: Deborah M. Cerullo SSND, James V. Murray and Ross Cheit

ABSTENTION: John M. LaCross

Deborah M. Cerullo SSND was elected as Vice Chairperson.

The next order of business was the Report of the Regulation Subcommittee regarding participation in employee contract negotiations. At Commissioner Cerullo's request, Staff Attorney Gramitt provided the background on the issue. He explained that it began in 2008 with an advisory opinion request from Diane Nobles, a union member who worked at a public university and also served on a local school committee which was negotiating with the NEA, although she was a member of a different local. He informed that the Commission conducted a workshop on the issue in 2009 and invited comment from the public and the unions. He noted that the Commission took a first vote to adopt a draft GCA that found a business association between union members and the umbrella organization. After receiving written comments, the Commission questioned whether to address the issue through a GCA or rule making.

Staff Attorney Gramitt stated that the draft GCA was tabled and, at the Commission's request, the Staff presented four draft options for rule making. The draft options were not placed back on the agenda for consideration at the Chair's direction due to the fact that the Commission was seeking new Legal Counsel and various matters were pressing. In January 2011, a Subcommittee was created to consider the issue, consisting of Commissioners Cerullo, Harsch and Magro. After meeting in January, February and March, he reported

that the Subcommittee has draft language for the Commission's consideration.

Commissioner Cerullo advised that she recommends one regulation addressing the issue as a prohibited activity. She expressed that the Subcommittee did not believe that amending the definition of business associate was as direct or would address all the conduct that the Commission wanted. She indicated that they wished to look at the issue in a way that did not apply only to unions. She stated that the Subcommittee focused on the fact of public employment and added section (b) regarding voting on the entire contract. She stated that the proposal is no more or less restrictive than the nepotism regulation and lessens the impact on the public official, whose role is not eliminated, only narrowed.

In response to Commissioner Lynch, Staff Attorney Gramitt explained that the class exception only applies to section 5(a). In response to Chair Cheit, Commissioner Cerullo stated that negotiation and or consideration of contract issues includes discussions and informal conversations that are not part of the formal negotiations. Commissioner Magro indicated that it would entail all aspects of the contract up until the final vote. Chair Cheit inquired if disciplinary issues, which are addressed by contract, would be covered. Commissioner Lynch questioned whether it would pertain to a grievance. Commissioner Cerullo indicated that she does not see how grievances or disciplinary issues would be covered. In response

to Chair Cheit, Commissioners Cerullo and Magro confirmed that the Commission would be saying that Diane Nobles, who is professional staff at CCRI, would be directly affected by the teachers' contract in her local municipality.

Commissioner Magro recalled union testimony that they always look to comparables in negotiations. Chair Cheit countered that he could understand it if Ms. Nobles were a teacher, but she is not. Commissioner Magro stated that the terms of their employment under the collective bargaining agreement is impacted by the terms of other collective bargaining agreements. In response to Chair Cheit, Commissioner Magro indicated that comparables would not include all other collective bargaining agreements, just those agreements within their union. Chair Cheit expressed that it would seem to matter what job the person is doing. Commissioner Magro stated that different job titles would not mean that the terms of their employment would not be similarly affected.

Chair Cheit inquired what conduct would be covered by the draft regulation that would not be covered by the route of amending the definition of business associate. Commissioner Cerullo replied that it would involve the nature of comparables, and she noted that the business associate model would limit it to union members. Chair Cheit commented that the proposal seems to be stipulating that there is a direct impact in wider situations than would pass section 5(a)'s direct impact test. He questioned whether this approach would

include a lot of situations where the Commission would not be able to prove a direct impact. Commission Magro opined that it would not because the Commission has been told that there is a practice of looking to comparables as the starting point in negotiations. Commissioner Lynch commented that it is not community specific. Chair Cheit observed that the Commission would be saying that an individual has a conflict even though the community in which they work and the community in which they hold public office are not comparable, such as Providence and Jamestown.

In response to Chair Cheit, Commissioner Harsch stated that every contract is comparable and used at the outset as a baseline for the next negotiations. He noted that the Commission would be tactically addressing the way in which this historically has been done. Commissioner Lynch expressed his belief that this would prevent teachers from serving on school committees. Commissioner Magro disagreed. Commissioner Lynch noted that negotiating the contract is a large part of what they do and the proposal would allow them only to vote on the bottom line and not use their expertise as an educator. He expressed that this goes beyond extending the definition of business associate. He pointed out that every contract has co-pay issues and questioned whether that would prohibit any public employee from being involved in discussing co-pays in any contract. Chair Cheit comments that the proposal would mostly impact elected public officials and inquired if the Subcommittee considered the disenfranchisement issue. Commissioner Harsch

replied that it had; however, he stated that the proposal would not prohibit them from performing their other functions. Commissioner Cerullo stated that section (b) was added to address that concern and allow voting on the bottom line contract.

Commissioner Murray inquired if grievance procedures would be covered as a part of the contract. Commission Harsch replied that the procedures would be covered but an individual grievance matter would not. Commissioner Murray expressed concern that the draft proposal does not read that way. Commissioner Lynch inquired as to whether utilizing “contract terms” would be better than “contract issues.” Chair Cheit asked if “pursuant to practice” means that a contract could be compared or that it actually is. Commissioner Magro stated that it assumes that comparable contracts will be compared. Chair Cheit cautioned about what type of fact finding the Commission would be getting into if that is an assumption. Commissioner Cerullo clarified that it would include those subject to being compared, even if they are not being compared. Chair Cheit questioned what problem the Commission is solving if the prohibition applies to situations whether the comparison is not actually happening.

Commissioner Cerullo noted that the Commission applies a prohibition in the nepotism regulation even where it cannot anticipate that there would be a financial gain. Commissioner Lynch stated that it would result in a school teacher being unable to negotiate a police

contract because both of their contracts contain co-pays. Commissioner Cerullo stated that the Subcommittee attempted to broaden the proposal so it would not just apply to unions. She indicated that they wanted a bright line prohibited activity like that contained in the nepotism regulation. Chair Cheit expressed his view that this creates a rule that covers much more and is based on assumptions regarding contracts being comparable. Commissioner Lynch suggested narrowing down the last sentence to similar positions. Commissioner Harsch expressed support for the suggestion and indicated that he would like to consider some language to that effect.

In response to Chair Cheit, Staff Attorney Gramitt stated that, depending on the facts, the current Code could prohibit the fire chief in one town from negotiating the contract for the fire chief in another town. In response to Commissioner Harsch, Staff Attorney Gramitt stated that it would not be appropriate for the Staff to provide a specific opinion on the proposal. In further response to Commissioner Harsch, he noted that the Subcommittee had discussed applying it to people holding the same position. Chair Cheit expressed that this would seem to cover situations in which there is no self-interest, such as a firefighter negotiating a contract for nurses. Commissioner Magro stated that he did not consider it to apply to every contract.

Chair Cheit noted that it would not be appropriate to ask for a vote

today, given that Commissioner Butler is not present to provide comment and Commissioner LaCross is newly appointed. Commissioner Cerullo indicated that they did not consider all job descriptions and questioned if it would be advisable to further review the proposal, in light of the concerns raised, and come back with additional language for consideration. Commissioner Harsch expressed support for the Subcommittee conducting further review. He asked any members with questions to participate in the review and reiterated that he would like to see language as proposed by Commissioner Lynch. Chair Cheit expressed appreciation for the work of the Subcommittee and asked the members to report back, perhaps in two meetings.

The next order of business was a Legislative Update. Staff Attorney Gramitt advised that he testified before the House and Senate Judiciary Committees last week on bills to restore the Commission's jurisdiction over legislators. He noted that the only opposition was voiced by Steve Brown of the ACLU, who cautioned against having legislative and enforcement authority in one body. He reported that the bills have been held for further study. He indicated that the bill could pass the House this year, as it did last year. Staff Attorney Gramitt advised that Senator Sheehan introduced a bill past the deadline which would place appointment of the Commissioners squarely within separation of powers. All nine members would be gubernatorial appointments subject to Senate advice and consent. He noted that he did not testify on this bill because the Commission

historically has not taken a position on such matters. He indicated that current members would be allowed to serve until the expiration of their terms.

The next order of business was a Staff Report and Commission discussion regarding the awarding of public contracts that do not adhere to an open and public bidding process. Senior Staff Attorney D'Arezzo informed that this issue was raised in January after the informal resolution of a Complaint in which a municipal contract was awarded in violation of section 5(h). She stated that former Chair Binder questioned why it would not be a violation of the Code for the person who awarded the contract as well. Staff was asked to review relevant statutes and regulations regarding government purchasing to determine if there is language that could be adopted by the Commission.

Senior Staff Attorney D'Arezzo advised that she reviewed the State Purchasing Act, and regulations promulgated thereto, as well as the Municipal Purchasing Act, which are complex and contain numerous enumerated exceptions, including the authority of the Chief Purchasing Office to make exceptions and authorize utilization of alternate processes when deemed in the best interest of the state. She informed that, in general, contracts in excess of \$10,000 for construction, and \$5,000 for all other purchases, must go through an enumerated public process. She stated that the processes set forth in the Act include competitive sealed offers, competitive negotiation,

non-competitive negotiation, small purchase procedures, and reverse auctions. She noted that the statutes and regulations do not use the “open and public process” language found in 5(h).

Senior Staff Attorney D’Arezzo informed that she consulted with Attorney Louis DeQuattro, who previously served as the State Purchasing Agent, for guidance in navigating the purchasing requirements. Attorney DeQuattro advised that the failure to follow the state purchasing requirements constitutes a violation of the Purchasing Act for which state officials and employees can be subject to discipline, sanctions, suspension and termination by the Chief Purchasing Officer and/or Purchasing Agent, and for which vendors can be subject to debarment. She informed of his representation that employees have faced such disciplinary measures. Senior Staff Attorney D’Arezzo related Attorney DeQuattro’s observation that the subject conduct is already prohibited. She stated that Attorney DeQuattro indicated that he would be able to provide the Commission with any information or input it required. Chair Cheit commented that the fact that employees are subject to discipline does not mean that they are disciplined, so there is still a rationale for the Commission to make it a violation of the Code.

Senior Staff Attorney D’Arezzo stated that a concern would be that the Commission would be extending its jurisdiction to enforcement of the Act, which is within the purview of the Chief Purchasing Officer

and subject to judicial review. She indicated that the Commission would be making a factual determination that the Act was violated, which may or may not be the same conclusion reached by the Chief Purchasing Officer or the courts. Commissioner Cerullo inquired as to other situations where a statutory violation also constitutes a violation of the Code. Senior Staff Attorney D'Arezzo indicated that conduct violating the Code may constitute a violation of other statutes, such as a quid pro quo under 5(g) and criminal bribery. However, she noted that there are different standards and different requisite elements for each offense.

Here, she indicated, the failure to comply with the purchasing requirement set forth in the Act would constitute the Code violation. In response to Commissioner Cerullo, Senior Staff Attorney D'Arezzo stated that if the Commission learns of such conduct it has the ability to provide that information to the agency with enforcement jurisdiction. Chair Cheit suggested that this matter be continued to the next agenda for further discussion.

At approximately 11:33 a.m., Commissioners Heffner, Magro and Lynch left the meeting.

The next order of business was the Director's Report. Executive Director Willever reported that there are five complaints and six advisory opinions pending. He stated that the Commission received three formal APRA request since the last meeting, all of which were

granted. Executive Director Willever congratulated Chief Investigator Cross for having attained forty years of public service. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To commend Steven T. Cross for his forty years of public service.

The next order of business was New Business. Chair Cheit requested that the issue of whether there should be an exception for contracts awarded pursuant to sealed bids should be placed on the Commission's list of issues to consider. He commented that the Commission generally votes in the same order and he welcomes any suggestions with regarding to changing the process so that one member is not always first or last.

At 11:35 a.m., upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary